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BRIEF ON MERITS.

No. 741. 44

IN THE

Supreme Court of the United States

October Term, 1952.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENETT, STEWART M. HANSON, and W. R. McENTIRE, *Petitioners,*

and

MELVA SEAMONS and ROY HILL, d.b.a. SEAMONS TRUCK LINES, and JOSEPH J. MILNE TRUCK LINES, INC., a Corporation, *Petitioners,*

v.

WYCOFF INCORPORATED, a Corporation, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENT.

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Petitioners,

v.

WYCOFF COMPANY, INCORPORATED, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED.

1. When distributors of motion pictures ship prints thereof from California and New York via their branch exchange offices in Utah for showing by exhibitors of motion pictures in the area of several states served by such branch exchanges, under contracts between such distributors and exhibitors providing for exhibition under limited copyright,

is the transportation between such exchanges in Utah and exhibitors in Utah in interstate commerce?

2. Whether a single district court judge had jurisdiction to determine whether the transportation between points in the State of Utah of motion picture film, under the facts of record, was in interstate commerce and could lawfully be transported under the authority of a certificate of public convenience and necessity issued by the Interstate Commerce Commission, without interference by the Public Service Commission of Utah, in view of Section 2281 of Title 28 of the United States Code.

COUNTER STATEMENT.

To correct certain inaccuracies and omissions in the "Statement" of the petition's brief, pages 3-8, it is deemed necessary to make a "Counter Statement."

Respondent, Wycoff Company, Inc., a corporation, is engaged in the transportation of motion picture film including newsreels between motion picture exchanges at Salt Lake City, Utah, and exhibitors of motion pictures at various points in Utah, under authority of a certificate of public convenience and necessity issued by the Interstate Commerce Commission. This certificate authorizes such transportation between the Salt Lake City exchanges and points not only in Utah but as well in the States of Idaho and Montana (R. 1). Petitioner, Public Service Commission of Utah, issued respondent an "Interstate License" to transport under the authority of the certificate issued by the Interstate Commerce Commission, within the State of Utah (R. 2).

The Commission petitioner, in answer to these facts averred in the complaint, in the District Court, below, admitted that the transportation of newsreels between points in Utah is in interstate commerce (R. 3). The answer takes exception to these facts only to the extent that they infer that the transportation of motion picture film, other than

newsreels, within the State of Utah, is interstate in character, or that the "Interstate License" issued by it, declared that the transportation of motion picture film within the State of Utah is in interstate commerce or interstate in character (R. 3-4).

The Interstate Commerce Commission could have issued such certificate to respondent, authorizing transportation between points in the State of Utah, under the limitation of the Interstate Commerce Act, 49 Stat. L. 551, 49, USCA 307, only upon a finding that the service authorized thereby:

> "is or will be required by the present or future public convenience and necessity".

Further facts admitted by petitioners in their request for admission of facts, District Court, below (R. 4-7), and reply of respondent (R. 7-8), are as follows:

The transportation of newsreels has been designated as interstate in character by the Interstate Commerce Commission (R. 7-8). Newsreels are customarily produced, processed, manufactured and packaged outside of the State of Utah, and are shipped from out-state points into the State of Utah for the purpose of being exhibited in theatres in Utah and the surrounding states. These newsreels are customarily booked under an agreement whereby the theatres in Utah and the other states contract in advance to receive and exhibit the newsreels prior to actual delivery in the State of Utah. It is customary for exhibiting theatres to show not only a newsreel, but also other films designated as a feature, comedy and also short subjects, all of which are distributed by different national film companies having branch offices in Salt Lake City, Utah. The distributors have principal offices in New York and California, and maintain branch offices in Salt Lake City from which they distribute the various types of motion pictures throughout Utah and the surrounding states (R. 4-5).

In addition to the newsreels, the other motion picture films are likewise processed, manufactured and packaged outside the State of Utah for shipment to the State of Utah. These film distributors do not sell newsreels, features nor comedy films, but only license the right to exhibit them, and the ownership remains in the film distributors. The local distributing office in Utah is merely a branch office of the non-resident film company (R. 7-8). The branch offices so maintained by some twelve national distributors distribute the film not only in the State of Utah, but also in parts of Wyoming, Montana, Oregon, Idaho and Nevada (R. 6-7).

With the above facts admitted by agreement, the factual issue is narrowed to the following:

Is the other motion picture film (features, comedies and short subjects) interstate in character in the same manner as admitted for newsreels?

To determine the answer to this question, it is necessary to review the entire transaction in order to determine the essential nature of the commerce.

Witnesses from five national distributors testified and showed the practice to be as follows:

Salesmen from the branch exchange offices of the distributors in Salt Lake City solicit applications from exhibitors, in the territory of the states served by these exchanges, to be licensed to exhibit the motion picture described therein. These applications which are in the form of a standard contract, are then sent by the exchange to the main office of the distributor, generally in New York, for approval or rejection. The contract for such licensed showing by the exhibitor does not become effective until approved and accepted by the home office (R. 28, 52, 59, 63-65, 70, and Exhibits of agreements, R. 82A, 82C).

These agreements designate the theatre and its location and describe the pictures licensed to be there shown, the conditions and limitations under which the distributor permits the exhibitor to have them for showing, the time the exhibitor may retain them for showing, provide the

means by which the exhibitor may obtain the prints from the distributor and return them to the distributor. (See contracts (R. 82A, 82C).)

Exhibit No. 1 (R. 82A) is a standard form of Republic Pictures (R. 63). The first paragraph of this agreement specifically provides:

> "LICENSE—FIRST: The *Distributor grants the Exhibitor*, and the Exhibitor accepts, *a limited license under the respective copyrights* of the motion pictures described in the Schedule hereof and under the copyright of any matter included in sound recorded therewith, *to exhibit* publicly *said motion pictures* and to reproduce for public performances such recorded sound in synchronism therewith, but only on 35 mm. film, *at the said theatre and for the run, the number of consecutive days specified in the Schedule, and on the play dates therein provided for only, and for no other use or purpose;* provided that the reproducing equipment in the theatre will operate reliably and efficiently to reproduce such recorded sound with adequate volume and high quality; and provided further that if copyrighted musical compositions are included in such recorded sound, the Exhibitor will have obtained at the date or dates of the exhibition of each of such motion pictures a valid license to perform publicly the said copyrighted musical compositions. If more than one theatre is herein designated, the said motion pictures are licensed for exhibition at only one of such theatres unless otherwise in the Schedule specifically provided. (Emphasis supplied.)
>
> "TERM AND WARRANTY—SECOND: (a) The Distributor agrees, subject to each and all of the terms and conditions hereof to deliver to the Exhibitor, and the Exhibitor agrees to exhibit at said theatre, upon the date or dates herein provided for, a positive print of each of said motion pictures, except such as may be

excluded, as provided in Clauses FOURTEENTH AND FIFTEENTH hereunder."

The fourth paragraph of the agreement requires that the exhibitor shall pay the distributor for any part of the print lost, stolen, destroyed or injured, while in the hands of the exhibitor, and with the distinct condition that, "Such payment, however, shall not transfer title to or in any such positive print to the exhibitor."

Clearly the obligation of the distributor, therefore, is to service the exhibitor with a print to permit the showing under the limited license under copyright of the picture specified by the agreement. The prints are not sold but remain at all times the property and under control of distributor.

The print, during the period it is in the exchange area, remains the property of the distributor and under its full control. The agreement provides for return by exhibitor to distributor when it has served its "limited license under copyright." Full discretion as to maintenance of the prints remains in distributor, which can require the print to be returned for inspection or "circuited" to another exhibitor in the same or another state (R. 36-37) or to another exchange area (R. 31, 32, 61).

The absolute control which distributor maintains, at all times, over the film, is made clear by the testimony of witness Elliott S. Windward of RKO Pictures, Inc., referred to in the supplemental opinion of the Court of Appeals (R. 129), which is as follows:

"Q. Can you state whether or not your office exerts any control over what shipper (carrier) will be employed? Must certain requirements be met by carriers for you to release films to it?

"A. He must have the proper credentials involving insurance and protection of the prints while in his possession; he must be a licensed carrier, and he must also be approved by our home office.

"Q. The home office requires approval?
"A. Yes." (R. 53-54). See also Republic (R. 66).

* * *

"A. And his plan of operation enters into it considerably." (R. 57) See also Republic (R. 20).

The exhibitor determines the play date as specified by the contract (R. 54, 77). All bookings are transmitted to the New York Office (R. 27). In some instances the exact date of showing is provided in the contract (R. 54).

"Newsreels"—Agreements for the licensing of newsreels are for an issue covering showing on 52 or 104 specified days (R. 28-29). The contracts are made for a full period of a year (R. 28-29), sometimes for 2, 3, 4 or 5 years (R. 71). Necessarily, these contracts are concluded "before the event (news) has happened," and before the prints are produced (R. 29, 71). Newsreels are subscribed for the same as newspapers (R. 50). Same service in exchange as with shorts and feature pictures—inspection, received in cartons, placed on reels and heads and tails added (R. 27, 41).

"Short Subjects"—Agreements for licensing of short subjects are also written in series for showing on specified days of each week, such as 13 episodes for 13 consecutive Fridays and Saturdays. They are contracted for before produced or they reach the exchange in Utah (R. 61, 52, 28).

"Features"—Feature pictures are received and handled at the exchanges in the same manner as newsreels and short subjects (R. 27, 41). Applications for licensed showing are made by exhibitors to the branch exchange. This application becomes effective as a contract only when approved by the main office of the distributor in New York City (R. 52, 54, 63-65, 70. See also exhibits of contracts, R. 82A, 82C). Some features are sold, like newsreels and short subjects, on a release schedule during 12 months of the release year, on a yearly contract (R. 60. See contract R. 82A, which describes the pictures licenced thereunder).

These prints are not produced when sold (R. 60). Generally the contracts are made before the picture reaches the exchange. Petitioners seek to give the impression that the applications for showing are not received until after a "screening" or showing of the pictures at the exchange. This practice is followed by two of the distributors. The witness from R. K. O. testified that they invite exhibitors to come in to see practically every picture. But the number who go to the screening is nil—only about 6 people attend (R. 55). The other is Twentieth Century-Fox, which does not sell pictures before a trade showing (R. 71). It was not developed how many attend such showings. But it cannot be a controlling factor. It is no more than selling by sample.

The pertinent and controlling fact is that the prints are shipped from the laboratories of the distributors in New York, New Jersey and California, to their branches, the exchanges, in Salt Lake City, Utah, solely for the purpose of carrying out the agreement to permit the licensed showing of the prints so shipped. The only intention with which the prints are shipped into Utah is to permit exhibition of the prints by the exhibitor and at the theatre location named and specified in the contract.

SUMMARY OF ARGUMENT.

Respondent is in accord with petitioners that the determination of whether the considered transportation is in interstate or foreign commerce is essentially one of fact.

All of the decisions are determined on the basis of facts as found in each case, just as the Court of Appeals, below, did in the instant case, in conformity with the finding of Justice McReynolds, in the cited case of *Public Utilities Commission v. Landon*, 249 U. S. 236 (1819) at 245:

> *"Interstate Commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods."* (Emphasis supplied.)

The facts are those of the commercial methods developed by the moving picture industry in the distribution of motion picture film.

These facts are very definitely distinguished from the facts in the cases relied upon by petitioners.

The original and only intention of shipping the motion picture prints from the laboratories of distributors in New York, New Jersey and California to the branch exchanges in Utah is to provide for the licensed exhibition of the prints by the exhibitors in Utah, at the destination named in the contracts for such showing between these exhibitors and distributors. That intention was persisted in and carried out. Hence, the essential nature of the movement was interstate.

This is the doctrine of *B. & O. v. Settle*, 260 U. S. 166, which gives support to the opinion of the Court of Appeals, below, in the statement pages 170-171:

> "And whether the interstate or the intrastate tariff is applicable depends upon the *essential character of the movement*. That the contract between shipper and carrier does not necessarily determine the char-

acter was settled by a series of cases in which the subject received much consideration."

* * *

"Under these circumstances, *the intention as it was carried out determined,* as matter of law, the essential nature of the movement; and hence that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the *intention* with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been *intended,* these incidents are without legal significance as bearing on the character of the traffic."

The Court of Appeals, below, has properly, under the facts and the law, found the transportation to be interstate.

Actually, the only question presented to the District Court, below, was whether respondent could transport the film, between points in Utah, under the authority given it by the Interstate Commerce Commission, and if so whether the petitioner, Public Service Commission of Utah, could interfere therewith.

Since no question of the constitutionality of the law creating such commission was raised the single judge of the District Court, below, had jurisdiction.

ARGUMENT.

I.

Under the Facts of Record the Transportation Here Involved Is Interstate.

The only question for determination is whether respondent may legally transport motion picture film between points in the State of Utah under the certificate of public convenience and necessity issued to it by the Interstate Commerce Commission.

The determination of whether or not the Court of Appeals, below, erred, depends upon whether the facts were properly construed and applied to the law.

This statement coincides substantially with the statement made by petitioners at page 9 of their brief:

> "a determination of whether the film transportation in this case wholly between Utah points, is in inter- or intrastate commerce is essentially a factual consideration."

This case is controlled by, and limited in its effect, to the facts peculiar to the distribution of motion picture prints by the major distributors thereof from laboratories in New York, New Jersey and California, under agreements, made in New York, and obligating the delivery of such prints to motion picture exhibitors in Utah, for showing such prints under limited license.

This method of distribution has been developed by the motion picture industry uniformly throughout the United States. The distribution is effected through some thirty-two centers at which the distributors have branches, known as exchanges.

The present case involves the distribution center at Salt Lake City, Utah. Similar facts involving the distribution of motion picture film through other distribution centers have been considered by your Court and other Federal Courts.

In *Binderup v. Pathe Exchange*, 263 U. S. 291 (1923) there were like facts relating to distribution of motion picture prints through the Omaha, Nebraska, Center. While that case related to the Anti-Trust Act, and it is admitted that the general conclusions as to jurisdiction under that Act would not be decisive in the present case, yet it made certain findings with respect to the facts which are pertinent to the present proceeding.

Mr. Justice Sutherland construed the facts of that case, at page 309, as follows:

> "The film contracts were between residents of different States and contemplated the leasing by one to the other of a commodity manufactured in one State and transported and to be transported to and used in another. The business of the distributors of which the arrangement with the exhibitor here was an instance, was clearly interstate. It consisted of manufacturing the commodity in one State, finding customers for it in other States, making contracts of lease with them, and transporting the commodity leased from the State of manufacture into the States of the lessees. If the commodity were consigned directly to the lessee, the interstate character of the commerce throughout would not be disputed. Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in the same State, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. *The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an interstate character 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end.'* Illinois

Central R. R. Co. v. Louisiana R. R. Comm., 236 U. S. 157, 163. And see, Western Union Tel. Co. v. Foster, 247 U. S. 105, 113; Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 349." (Emphasis supplied.)

This construction is remarkably similar to the construction of the facts of the instant case by the Court of Appeals below.

Kappler v. Republic Pictures Corporation, 59 F. Supp. 12 (1945), affirmed 151 F. (2d) 543 (1945), affirmed *per curiam*, 327 U. S. 757 (1945), and on which rehearing was denied, 327 U. S. 817 (1945), considered the distribution of motion picture film through the Des Moines, Iowa, distribution center. This case reviewed the application of the Fair Labor Standards Act of 1938, which required an analysis of the transportation involved in the distribution of motion picture film as appears by the findings, based upon the facts as follows;

The District Court, said;

"The trouble with this contention is that it assumes that the films came to rest in Iowa. The defendant in this regard relies upon that class of cases where goods are purchased and shipped to a person in the state for resale and the shipment terminates before the resale is made. Walling v. Jacksonville Paper Co., 317 U. S. 564, 63 S. Ct. 332, 87 L. Ed. 460.

"The defendant overlooks, however, the fact that the shipments from New York and New Jersey to Iowa were made by the corporation to its branch office and were not completed transactions to a third party.
* * *

"Under this situation, the goods did not come to rest in Iowa, but *the interstate character of the transportation continued until the goods were in the hands of exhibitors, and even then they only stopped temporarily as the goods were licensed and not sold, and the transportation continued until after all the exhibitors*

had used them when they were returned to Des Moines and probably back to New York City." (Emphasis supplied.)

The Circuit Court of Appeals, at page 545, in affirming the above decision of the District Court, said:

"*Defendant was not shipping the films to Des Moines to be stored nor for final delivery, but its business depended upon these films being kept in circulation. Plaintiff was an active factor in keeping the films in such circulation and use. We think it clear that the transportation of the films and their use must be viewed as a continuity, embracing shipments from New York and New Jersey to Des Moines, Iowa, and the shipment of them to and from Des Moines to other points of Iowa and other states.*" (Emphasis supplied.)

* * *

"Plaintiff does not contend that he was engaged in the actual production of goods for commerce. As has been observed, he kept records which were essential to the *movements* of the goods of the employer in commerce." (Emphasis supplied.)

These constructions of the facts relating to the distribution of motion picture film, are in full accord with the general principles repeatedly enunciated in distinguishing between interstate and intrastate traffic.

Illinois Central R. R. C. v. Fuentes et al., Constituting the Railroad Commission of Louisiana, 236 U. S. 157 (1915) related to an order of the Railroad Commission of Louisiana relative to switching of cars between connecting carriers and requiring carriers to conform to rates established by the State Commission. A situation arose where cars from outside the state were consigned to an individual at New Orleans. After arrival, the consignee desired the cars switched to certain locations within the switching limits, to some terminal or industrial track for delivery. The opinion, in finding that a permanent bill of injunction against

the State Commission should have been awarded, found at page 163;

> "When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end. McNeill v. Southern Railway, 202 U. S. 543, 559; Southern Pacific Terminal v. Interstate Commerce Commission, 219 U. S. 498, 527; Ohio Railroad Commission v. Worthington, 225 U. S. 101, 110; Texas & New Orleans Railroad v. Sabine Tram Co., 227 U. S. 111, 126; Louisiana Railroad Commission v. Tex. & Pac. Ry., 229 U. S. 336, 341."

Western Oil Refg. Co. v. Lipscomb, 244 U. S. 346 (1917) laid down the general rule, at page 349:

> "Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498; Ohio Railroad Commission v. Worthington, 225 U. S. 101; Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111; Louisiana Railroad Commission v. Texas & Pacific Ry. Co., 229 U. S. 336, Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa, 233 U. S. 334, 343;

South Covington & Cincinnati Street Ry. Co. v. Covington, 235 U. S. 537, 545."

Western Union Telegraph Co. et al. v. Foster et al., 247 U. S. 105 (1918) commenting upon *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 126; said,

"Practice, intent and the typical course, not title or niceties of form, were recognized as determining the character, * * *"

Under the facts of record, the distribution of motion picture prints falls clearly within the above findings and established principles of law. The lease agreement obligates the distributors to ship prints from their laboratories outside of Utah, to exhibitors in the State of Utah, and other states within the distribution area of the branch exchanges of the distributors at Salt Lake City. Otherwise these exhibitors could not show or exhibit these prints under the license of the lease agreement. Definitely, therefore, the only intent or purpose with which the distributors could so ship the prints was to get them into the hands of the exhibitors who have contracted for their showing. There is, therefore, a continuing transportation until the prints have reached the exhibitors. The transportation into Utah is interstate and so remains, unbrokenly, until the film has reached the intended exhibitors at the destinations specified in the agreement of lease. The essential character of the transportation is, therefore, interstate. As indicated by the *Western Union* case, *supra*, the courts, in construing the facts, consider the actual commercial practices as bearing upon the intent of the parties. In line with these decisions, the Court of Appeals in *Kappler v. Republic Pictures Corp.*, *supra*, found that the distributors were not shipping the film to be stored or for final delivery, but their business depended upon these films being kept in circulation. The District Court in that case was following these principles in finding that even after the film was in the hands of the exhibitors, "they only stopped temporarily as

the goods were licensed and not sold, and the transportation continued after all the exhibitors had used them when they were returned" to the exchanges.

Under the foregoing analysis of facts and the applicable principles of law, the Court of Appeals, below was fully justified in its conclusions and findings, and, therefore, its decision should be sustained.

The facts underlying this distribution are different and definitely distinguished from those in *Atlantic Coast Line R. R. Co. v. Standard Oil Co.*, 275 U. S. 257, and the other cases relied upon by the brief of petitioners as clearly stated in the abstract from that case set forth on page 22 of petitioners' brief, as follows:

> "The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa. Port Tampa, Jacksonville, or the St. Johns river terminal. Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it."

In *Beggs v. Kroger Co.*, 167 F. 2d 700 (1948), (C. C. A. 8, 1948), Kroger maintained a warehouse in Little Rock, Ark., from which it supplied its retail stores in Arkansas. It distributed its goods from its warehouse in Little Rock to its stores throughout Arkansas by its own trucks. The drivers of these trucks sought relief under the Fair Labor Standards Act for additional compensation. The defense of Kroger was that the transportation was in Interstate Commerce and that, therefore, the activities of the truck

drivers were exempt from the Fair Labor Standards Act. In holding for the defendant, the Court said:

> "Practically all of the goods the defendant transported to its retail stores in Arkansas were processed, manufactured or processed outside the state for the specific purpose of being moved to the retail stores for sale. That part of the goods which went through the warehouse did not 'come to rest' in the warehouse. The warehouse was merely a convenient instrumentality for the division of the shipments coming to it, and the continuation of the movement of each part to the retail stores. The facts in this case distinguish it from cases such as *Atlantic Coast Line Ry. Co. v. Standard Oil of Ky.*, 275 U. S. 257. Here, the defendant knew when the shipments began out state that all of them were destined to the retail stores. The warehouse was not a wholesale establishment, and none of the goods that entered it were resold."

The Interstate Commerce Commission in *Transway, Inc. v. Exhibitors Delivery Service, Inc.*, 51 M.C.C. 263 (1950), had before it a complaint which was filed against a carrier for transporting newsreel between points in Louisiana without authority from that Commission. The factual material in the *Transway* case is essentially similar to the facts involved in this case, except that the complaint was restricted to the transportation of newsreels and did not relate to the transportation of other film. In finding that the transportation of newsreels between points in Louisiana was interstate in character, the Commission said:

> "But it has long been held that such incidents of transportation as through billing, uninterrupted movement; continuous possession by the carrier, or unbroken bulk of the shipment, are not essentials of a through interstate shipment, when the intention with which the shipment is made is not in issue."

The Court of Appeals below, was amply sustained in its findings and conclusions, by the facts and the law.

II.

Petitioners Seek to Avoid the Effect of the Facts of Record and the Applicable Law by Certain Immaterial Contentions.

Petitioners, in their brief, attempt to avoid the controlling effect of the facts and the law, herein previously recited, confirming the findings and conclusions of the Court of Appeals, below. These contentions, which have no material effect, may be summarized as follows.

1. *Certain acts performed by the branch exchange after arrival of the prints in Utah, are advanced as ending the interstate movement of the prints.*

These consist of:

a. The exchange receiving the prints in cartons from which they are removed. This is construed to bring the prints under the break bulk theory.

b. Inspecting the prints, mounting them on reels, and adding "heads and tails."

The bulk is broken by an agent of the distributor, and not for resale. The prints, wound on reels and with "heads and tails" added are still the prints which the distributor shipped from out the state with the intention of fulfilling the agreement to permit their licensed exhibition by the exhibitors, and at the locations specified in the agreements.

If these services were performed at the laboratory, these contentions of the petitioners would be removed. The fact that the distributors had them performed by their branches in Utah could not affect the character of the interstate transportation under the facts here of record, and the applicable law.

These factors did not affect the findings in *Binderup v. Pathe Exchange* and *Kappler v. Republic Pictures Corp., supra.*

These contentions of petitioners are fully considered and answered in *Caldwell v. North Carolina,* 187 U. S. 622, (1903). The City of Greensboro, N. C. passed an ordinance requiring every person engaged in the business of selling or delivering picture frames, pictures or photographs, in the city, to pay a yearly license tax. A portrait company in Chicago, through an agent in Greensboro, made contracts for the sale of pictures in frames. The company shipped the pictures and frames in separate large packages, from Chicago to its agent in Greensboro. He broke the bulk of these packages and placed the pictures in the proper frames and then made delivery to the purchasers in the city. Contentions similar to those here made by petitioners, were ruled upon at page 631, as follows:

> "We are not persuaded by this reasoning. It seems to proceed upon two propositions—first, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the sender in Greensboro.
>
> "But it certainly cannot be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed either on the vendor out of the State or on the purchaser within the state. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce beyond the reach of the taxing power of the State. It is too plain for argument that the supposed incomplete condition of articles of commerce, if shipped directly to the purchasers, cannot subject them to the license tax.

"But we are not disposed to concede that, under the facts of this case, the pictures were, in any proper sense, incomplete when received in Greensboro. That the frames and the pictures were in separate packages, if such was the case, was merely for *convenience in packing and handling, and 'placing the pictures in their proper places'* (the language of the verdict), meant that each picture was placed in the frame designed for it. The selection of the frame was as much a part of the purchase and sale as the selection of the picture.

"Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate.

"Transactions between manufacturing companies in one State, through agents, with citizens of another constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out

of the salutary protection of the interstate commerce clause of the Constitution.

"It cannot escape observation that efforts to control commerce of this kind, in the interest of the States where the purchasers reside, have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation." (Emphasis supplied.)

2. *Delay of the prints at the branch exchanges, it is contended, terminates the interstate transportation.*

The brief of petitioners does not indicate any evidence of record showing great delay of the prints at the branch exchange. Taking the record as a whole the evidence is that the object of circulating the prints in the distributive area of the exchange center is to permit the showing of the picture and the liquidation of the print as quickly after the release date as possible. In the case of serials, including westerns; short subjects; and newsreels, they are produced for showing on days prescribed by the agreement of each week. The subjects depicted are such as not to permit of long delay in distribution. Newsreels which form part of the program of the motion picture theater are usable only while they are "news"—and how fleeting that is. Feature pictures must be shown as quickly as possible after the release date. The distributor must get them to the exhibitor and the exhibitor must have them for showing as soon as possible to meet the demand of the public created by the release publicity.

As found by the Court of Appeals in *Kappler v. Republic Pictures Corp., supra,* the distributor was not shipping the films to the exchange center to be stored, "but its business depended upon these films being kept in circulation", and that the exchange was an active factor in keeping

the films in such circulation and use. The record in this case is fully in accord with that finding.

It is clear, therefore, that the interstate character of the shipment cannot be affected, under the facts and circumstances of this case, by the length of time that the film is held by the exchange. The exchange holds the film only the time necessary to provide for its circulation.

3. Petitioners seek to give the impression that the motion pictures are not sold until after they reach the Omaha Exchange.

This is contrary to the evidence.

Petitioners admit in their brief, as is shown by the record, that newsreels are sold on a yearly contract for weekly or semi-weekly showings on particular days of the week. Necessarily, and as admitted by the brief, these contracts are made in advance of the time that the subject of news depicted could have arisen, and the picture could have been taken and produced. The record likewise discloses that short subjects and serials including westerns are similarly contracted for over a period of time providing for the delivery to the exhibitor on specified days of the week. These facts establish that the prints could not have been at the Utah Exchange prior to being contracted for.

This leaves then for consideration, only the feature pictures. Certain of these are also sold on yearly contracts. Witnesses appeared on behalf of five major distributors. Their testimony was, and as confirmed by the exhibits, R. 84A and R. 82C, that the exchanges solicited "applications" from exhibitors to be licensed to show certain designated pictures. These applications do not become effective until they are accepted by the main office of the distributor in New York City. Based upon the number of contracts approved for the licensed showing of the picture specified thereby, and the experience of the distributor, the number of prints of the picture to permit licensed showing by ex-

hibitors, in the area of distribution of the exchange are pped from the laboratories to the exchanges.

4. *Petitioners seek to rebut the plain meaning of the testimony, by contending that the pictures are sold only after "screening" at the exchange.* This means only that exhibitors are given an opportunity to view a print of the picture to determine whether they desire to apply for a licensed showing of it. The testimony is that exhibitors are invited to view such screenings but that very few avail themselves of the invitation. It would require only one print for such screening.

It is no more than selling a product by sample.

This was held in *Caldwell v. North Carolina, supra,* not to change the interstate character of the transportation.

5. *Storage of the prints at the exchange.* The branch exchange is the designated agency of the distributor to receive the prints. The testimony is that during the handling by the branch exchange the prints are stored in fireproof vaults. Such precautions cannot change the character of the transportation of the prints.

6. *That the transportation is arranged and paid for by the exhibitor cannot change the character of the commerce under the facts of this case and the applicable law.* The obligation of the distributor is to bring prints into the exchange to carry out the provision of its agreements to license the showing of the subject depicted thereby by the exhibitor. The agreement, paragraph 21 (exhibit 1, R. 82A), provides that distributor shall deliver a print to the exhibitor or his agent or to a common carrier designated by the distributor. This difference in transportation agencies or the question of who arranges for or pays the respective carriers is not controlling in determining the character of the commerce in which each carrier is engaged.

III.

The Effect of Sustaining the Findings and Conclusions of the Court of Appeals, Below, Would Not Extend Beyond Transportation Performed Under the Facts, Here of Record.

Petitioners contend that to allow the decision, herein, to stand, would drastically alter presently accepted concepts of interstate and intrastate commerce in relation to transportation upon a nation-wide scale. Such contention is not sound. It is inconsistent with the statement at page 9, of petitioners' brief, that the determination of whether film transportation in this case, wholly between the Utah points, is in interstate or intrastate commerce is essentially a factual consideration. The law is well settled. The determination as to whether the transportation is interstate or intrastate depends entirely upon the facts and circumstances in each case. The decision of the Court of Appeals, below, is limited solely to the facts and circumstances under which motion picture film is distributed. The decision would not be controlling under facts and circumstances which clearly show that the interstate transportation had ended upon entry into the state such as in *Atlantic Coast Line R. Co. v. Standard Oil Co., supra,* and other cases cited by petitioners.

On the contrary, the reversal of the opinion of the Court of Appeals, below, would create conflicts between federal laws and agencies.

It would prohibit respondent from operating under its certificate issued by the Interstate Commerce Commission, under the provisions of the Interstate Commerce Act, *supra,* requiring a finding by that Commission, that the grant of such authority is required by public convenience and necessity.

It would also deny respondent the benefit of the exemption under the Fair Labor Standards Act of 1938 (29 U. S. C. A. § 201 et seq.), extended to the employees of motor carriers under the control of the Interstate Commerce Commission.

In *Kappler v. Republic Pictures Corp., supra,* the Court found that the transportation, as here involved, was in interstate commerce. Your Court affirmed that decision. Also in *Beggs v. Kroeger, supra,* the court found that employees engaged in transportation between points in a state, under circumstances similar to those in the case here for consideration were exempt from the provisions of the Fair Labor Standards Act of 1938, *supra,* because they were under the control of the Interstate Commerce Commission.

Hence under these decisions respondent would be made subject to all of the provisions of the Fair Labor Standards Act of 1938, *supra.* It could enjoy the exemption from maximum hours of service of that Act only if, as found by the Court of Appeals, below, the transportation performed was within the authority of the Interstate Commerce Commission.

IV.

A Three-Judge District Court Was Not Required in This Case Because an Actual Issue of Unconstitutionality of a State Statute or Administrative Order Within the Meaning of Section 2281 of Title 28, United States Code Was Not Pressed Upon the District Court.

This proceeding arises out of a complaint brought by respondent in the U. S. District Court, for the District of Utah, below, for a declaratory judgment:

> "That the transportation of motion picture film and newsreels is interstate in its character, and the Interstate Commerce Commission has, by appropriate orders, so declared such to be a fact, and has exercised its jurisdiction thereover as to authority, rates, and safety regulations."

The prayer of the complaint requested an injunction against the petitioner, Public Service Commission of Utah, to guard against the possibility that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission, that petitioner had so threatened (R. 2, Par. 6 and R. 4), although

never actually carried out. It is true that a complaint was filed by the Public Service Commission of Utah to enjoin respondent from operating to a few specified points in Utah in the state court, but process was never served upon respondent (R. 64), and the Utah Commission thereafter acquiesced that the federal court was the proper forum to determine what was, or was not, interstate commerce.

As indicated in petitioners' brief, respondent did not challenge the regulatory authority of the Utah Commission acting in its proper sphere (Page 32, petitioners' brief). Respondent challenged only whether the State Commission was acting in its proper sphere, and the State Commission did not suggest that it would resist the judicial determination that respondent's operations in Utah were in interstate commerce (Page 36, petitioners' brief).

Accordingly, the case proceeded to trial, in the District Court, below, upon only the two issues set forth in Judge Ritter's pre-trial order:

> "(1) Whether or not as a matter of fact the carriage involved herein is interstate commerce.
>
> "(2) The issue of law as to whether the character of transportation as determined constitutes interstate commerce."

Injunctive relief, neither temporary, interlocutory nor permanent, has ever been granted or even urged be granted by the court outside of the naked recitation in the prayer of the Complaint. The sole question on appeal to the Court of Appeals for the 10th Circuit was stated by the court to be "whether the intrastate transportations are nonetheless integral parts of interstate transportation" (R. 84).

No useful purpose will be served by repeating and quoting the facts and authorities set forth in petitioners' brief under the first sentence of their Point III in support of the proposition that a three-judge court was not necessary in this case (see petitioners' brief, Pages 29-36), which are essentially agreed to by us. We wish to point out that the reference to the issuance of an *administrative order* by the

State Commission (see Page 36, petitioners' brief) must be speaking only of a *possible future administrative order* because none has ever been issued by that body, nor has any hearing been held by said State Commission to decide whether or not the transportation of motion picture film and newsreels between points in Utah is or is not in intrastate commerce (see also Page 32, petitioners' brief).

The sole question for the district court was to construe the statutory meaning of "interstate commerce" contained in the Federal Motor Carriers Act (49 U. S. C. Sec. 303). Such construction of a federal statute did not involve the unconstitutionality of a Utah statute. There is no order of the State Commission involved in this case. The construction of a federal statute does not involve the unconstitutionality of a state statute under the supremacy clause of the United States Constitution. *Ex parte Bransford*, 310 U. S. 354, 84 L. Ed. 1249; *Query v. U. S.*, 316 U. S. 486, 86 L. Ed. 1616; *Ex parte Buder*, 271 U. S. 461, 70 L. Ed. 1036; *Ex parte Hobbs*, 280 U. S. 168, 74 L. Ed. 353; *D. A. Beard Truck Line Co. v. Smith*, 12 Fed. Supp. 964.

Ex parte Buder, supra, involved the question whether the state statute or a federal statute applied, and after considering this question, the court stated, at 271 U. S. —, 70 L. Ed. 1036, 1038, as follows:

> "But in neither of these questions is the constitutionality of the state statutes involved; and a substantial claim of unconstitutionality is necessary for the application of Section 266. See *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 304, 58 L. Ed. 229, 239, 34 Sup. Ct. Rep. 48. The decree is thus not one from which a direct appeal lies to this court."

Ex parte Hobbs, supra, concerned an action to enjoin a rate order of the Kansas Insurance Commission which was alleged to be confiscatory under the 14th Amendment. At 280 U. S. 168, 172, the following appears:

> "He (the district judge) states that it appeared to him that the only question before him was the construc-

tion of the rate-making statute of Kansas, the plaintiff conceding its constitutionality for the purpose of the motion. He construed the act as not warranting a revocation of licenses for violation of the rate order or for anything that the plaintiff appeared to have done, and says that the injunction granted by him was not granted upon the ground of the unconstitutionality of the statute but restrained only something that by his construction the statute did not allow."

Ex parte Bransford held that a three-judge court was not necessary in a case to enjoin an assessment under a state tax statute as violating the United States Constitution and the laws of the United States and Arizona. At Page 358 of 310 U. S., 84 L. Ed. 1249, 1251, the court said:

"Insofar as it is alleged that the assessments are void because unauthorized by the Arizona statute, the injunction sought is obviously not upon the ground of the unconstitutionality of the state statute as taxed by the federal Constitution.

"The allegations that the assessments should be enjoined because violative of the statute exempting preferred stock owned by the Reconstruction Finance Corporation and Rev. Stat. Sec. 5219 depend upon no constitutional provision within the meaning of Judicial Code, Sec. 266. If such assessments are invalid, it is because they lavy taxes upon property withdrawn from taxation by federal law or in a manner forbidden by the National Banking Act.

"The declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment. This was decided as to Sec. 266 in *Ex parte Buder*, and before that a similar result had been reached in *Lemke v. Farmer's Grain Co.* in regard to a provision of the

Judicial Code granting direct appeal to this Court in cases where the sole issue was the unconstitutionality of a state statute."

D. A. Beard Truck Line Co. v. Smith, supra, was cited by the court in *Ex parte Bransford* as illustrative of the last proposition cited. That case held that no question of constitutionality was raised requiring the submission of the application to a three-judge court where an interlocutory injunction was sought upon the ground that a state statute, to restrain the enforcement of which the application was made, had been superseded by a federal statute.

Query v. United States, supra, was a case where the actual issue pressed upon the court was that a state statute as applied to the complainants violated the United States Constitution, which required a three-judge court. *Ex parte Northern P. R. Co.,* 280 U. S. 142, 74 L. Ed. 233, and *Mayo v. Lakeland Highlands Can. Co.,* 309 U. S. 310, 84 L. Ed. 774, also cited by petitioners as decisions contrary to the proposition that only a single judge was necessary, are also inapplicable under the present facts. Both cases clearly fall within the statutory provisions requiring a three-judge court because in both cases the complainant actively asserted the unconstitutionality of an administrative order (*Northern Pacific* case) or of a state statute (*Mayo* case).

It has been held that the mere form of words used in the complaint to allege the unconstitutionality of the action of state officers without support in law or fact cannot invoke the jurisdiction of a three-judge court. *Okla. Gas & E. Co. v. Okla. Packing Co.,* 292 U. S. 386, 78 L. Ed. 1318. Also that even though the unconstitutionality of a state statute pursuant to which a challenged order was made was pleaded, a three-judge court was not necessary where the plaintiff indicated that he did not intend to press the claim of unconstitutionality, *Ex parte Hobbs,* 280 U. S. 168, 74 L. Ed. 353.

No temporary restraining order, preliminary injunction, nor permanent injunction has ever been issued by any court in the course of the present litigation, as indicated by petitioners themselves, nor has the issuance of injunctive relief ever been pressed upon the court. This action has been only for declaratory relief. Even if the state of Utah should refuse to recognize the determination of the issues in this case by the Federal Court, which petitioners have specifically indicated is not intended (see Pages 36-37, petitioners' brief), the equity power of a single district court judge would then be sufficient to enter an injunction under the facts of this case.

V.

Defining Interstate Commerce Is a Proper Function of the Federal Courts. It Is Not a Question for State Administrative Determination Subject to State Judicial Review.

The only authorities petitioners rely upon to reverse the Circuit Court of Appeals because of alleged "local" questions are *Alabama Public Service Commission v. Southern R. Co.*, 341 U. S. 341, 95 L. Ed. 1002, and *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 85 L. Ed 971.

Neither of these cases applies here. In *Alabama Public Service Commission v. Southern R. Co.*, there was an administrative order entered by the State Commission pursuant to state statute which ordered the railroad to continue two of its trains which it had applied for permission to discontinue. After a full hearing on the evidence, the State Commission entered an order denying the railroad the requested permission. Without exhausting the state remedy for judicial review in the Alabama courts, the railroad sought to enjoin the order of the State Commission in the Federal District Court before a three-judge court. There is no such administrative order involving respondent which is pending in the courts of Utah, nor is there a "local" question involved.

In *Railroad Commission of Texas v. Pullman Co., supra,* a very controversial local social policy was involved in the order of the Texas Commission which required, in effect, a white pullman conductor where the railroad had theretofore employed only a colored porter to supervise pullman cars in certain sections of Texas. Obviously, no question of this kind is presented in the instant case.

Section 1337 of Title 28, United States Code, hereinafter set forth, was the basis of jurisdiction for the district court below:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

For the foregoing reasons, the Utah statutes providing for judicial review of orders of the Public Service Commission of Utah are not at issue here at all.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this day of November, A. D. 1952.

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